

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 7, 2007 Session

BRENDA CARR LAW v. MELVIN DOUGLAS LAW, JR.

Appeal from the Chancery Court for Williamson County
No. 29221 R. E. Lee Davies, Judge

No. M2006-00433-COA-R3-CV - Filed October 26, 2007

Brenda Carr Law (“Wife”) and Melvin Douglas Law, Jr. (“Husband”) were divorced in April of 2004, at which time the Trial Court approved a marital dissolution agreement (“MDA”) submitted by the parties. The MDA required, among other things, that Husband pay for the college education of the parties’ son, Stephen, but that “[t]he selection of a school to be attended by Stephen shall be based on the mutual agreement of Stephen and [Husband] ... [and Husband’s] approval shall not be unreasonably withheld.” After Husband refused to pay for Stephen’s college education for various reasons, Wife filed a petition seeking to have Husband held in contempt. This was one of several petitions for contempt filed by the parties post-divorce. The Trial Court granted Wife’s petition and ordered Husband to pay for Stephen’s college education. We affirm in part, vacate in part, and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery
Court Affirmed in Part and Vacated in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Suzette Peyton and G. Thomas Nebel, Nashville, Tennessee, for the Appellant, Melvin Douglas Law, Jr.

John J. Hollins, Jr., Nashville, Tennessee, for the Appellee, Brenda Carr Law.

OPINION

Background

This is an appeal from extremely contentious post-divorce proceedings, as evidenced by the fact that the pleadings and other documents filed after the divorce was granted have resulted in a technical record of almost 800 pages in length, not including two transcripts. We will simplify our discussion of the facts to those relevant to the issues before us.¹

The parties have a daughter who was emancipated when the divorce was granted in April of 2004. The parties also have a son who was 17 at the time of the divorce and who turned 18 approximately 6 months later in October of 2004.

The parties entered into an MDA that was approved by the Trial Court and incorporated into the final decree. We note that Husband is a surgeon and Wife has a Master's degree in child psychology from Harvard University. The MDA provides, *inter alia*, as follows:

Custody of the parties' minor child, Stephen, shall be vested in [Wife]. Stephen shall reside with [Wife]. [Husband] shall have visitation with Stephen at reasonable times and places under the direction of Dr. Jay Woodman, either in Fairfax, Virginia; Nashville, Tennessee; or at some other place mutually agreeable to the parties and [Husband] shall be responsible for paying all transportation costs associated with the exercise of visitation privileges with Stephen. Further, the parties shall ensure that Stephen participates in counseling sessions, either in person or by telephone, with [Husband] and Dr. Jay Woodman on such schedule as may be directed by Dr. Jay Woodman. [Husband] shall be responsible for paying the cost of such counseling.

* * *

[Husband] shall pay the cost of tuition, fees, books, room, board, medical insurance, as long as he can maintain coverage through his employer, and other expenses mutually agreed upon between Stephen and [Husband], associated with a four-year college or vocational education for Stephen, commencing immediately upon Stephen's graduation from high school, and ending four academic years later. The selection of a school to be attended by Stephen shall be based on the mutual agreement of Stephen and [Husband]. [Husband's] approval shall not be unreasonably withheld. The cost

¹ These lengthy post-divorce proceedings were heard by three different judges, Judge R. E. Lee Davies, Judge Timothy L. Easter, and Judge Russ Heldman.

of attendance for Stephen shall not exceed the cost of attendance at Boston University, unless otherwise agreed by [Husband]. [Husband's] obligation to pay these expenses associated with Stephen's college or vocational education shall automatically cease in the event Stephen fails to maintain himself as a student in good standing, as defined by the school Stephen attends.

* * *

In the event it becomes reasonably necessary for either party to institute or defend legal proceedings relating to enforcement of any provision of this Agreement, the prevailing party shall be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings.

The MDA divided the marital property. The MDA also required Husband to pay Wife: (1) \$2,100 per month in child support; (2) \$10,000 per month in alimony for a period not to exceed 120 months or until Wife remarries or dies, whichever occurs first; and (3) \$32,118.55 for Wife's attorney fees.

Following the seemingly amicable divorce proceedings, numerous petitions for contempt were filed by both parties. We will not summarize and detail each of these many petitions, but instead will focus on the petitions that form the basis for this appeal.

In October of 2004, Wife filed a petition for contempt claiming Husband had violated the MDA by failing to pay her health insurance benefits. Husband denied that he was in contempt of court. Following a hearing at which the parties testified, the Trial Court concluded that Husband was not in contempt of court. On March 28, 2005, the Trial Court entered an order dismissing Wife's petition. On May 5, 2005, Husband filed a petition seeking payment of attorney fees incurred in defending Wife's unsuccessful petition for contempt. The Trial Court granted the motion and awarded Husband \$15,000 in attorney fees. Wife then filed a motion to have the award of attorney fees reconsidered. The Trial Court reconsidered the award and decided the award of \$15,000 in fees should be vacated. According to the Trial Court, the March 28 order dismissing Wife's petition for contempt became final on April 27, 2005. The Trial Court then stated:

The [March 28, 2005] Order (prepared by [Husband]) did not grant attorney's fees and expenses to [Husband].... [Husband] did not file for relief pursuant to Rule 60 The Court's March 28, 2005, Order does not contain terms that are a result of mistake, inadvertence, surprise or excusable neglect, fraud, misrepresentation or other misconduct of an adverse party.... The Court cannot find that there is any other reason justifying relief from its March 28, 2005, Order.... [Husband] did not timely file a notice of appeal from the March 28, 2005, Order.... This Court did not have jurisdiction to consider

[Husband's] May 5, 2005, Motion for Attorney's Fees and Expenses, and this Court was incorrect in granting such motion.

One of Husband's numerous petitions for contempt involved his allegation that Wife was in civil contempt of court because Wife did not require the parties' son, Stephen, to attend counseling. As set forth previously, the MDA required the parties to "ensure" that Stephen participated in counseling sessions. Following a hearing on this particular issue, the Trial Court declined to find Wife in contempt. The Trial Court based its ruling primarily on both Wife's and the Trial Court's inability to force Stephen to attend counseling once Stephen turned 18, which occurred just 6 months after the parties were divorced. The Trial Court also determined that even if Husband's allegations were true, Wife was no longer in civil contempt because Stephen had turned 18 by the time the petition for contempt was filed.

In addition to the above issues, the parties were in sharp disagreement over Husband's obligation under the MDA to pay for Stephen's college education. At the trial court level, Husband claimed there were three reasons why he was no longer obligated to pay for Stephen's college education. First, Husband claimed that pursuant to the language of the MDA, he had the right to "withhold his mutual agreement regarding Stephen's college education, unless Stephen agrees to participate in counseling that is the equivalent of the counseling that had been ordered by this Court [in the MDA]". Second, Husband claimed that because Wife had effectively thwarted any effort by Husband to maintain a relationship with Stephen, Husband and Stephen had not reached a mutual agreement "on anything related to Stephen's education," which was a condition precedent to Husband's obligation to pay for Stephen's college education. Third, Husband claimed that pursuant to *Medearis v. Baumgardner*, No. E2005-01785-COA-R3-CV, 2006 WL 770464 (Tenn. Ct. App. Mar. 27, 2006), *no appl. perm. appeal filed*, he should be relieved of "any further duty of support for Stephen Law's educational expenses under the MDA." Because Husband refused to pay for Stephen's college education, Wife filed a petition for contempt seeking an order declaring Husband in contempt and ordering him to pay for Stephen's college education.

After numerous additional pleadings and exhibits were filed with respect to Husband's obligation to pay for Stephen's college education, the Trial Court entered an order providing as follows:

[Wife's] motion to compel [Husband] to pay the college education expenses for Stephen Law is granted. [This Court previously] entered an Order making [a] specific finding of fact that paragraph 8 of the April 4, 2004, Marital Dissolution Agreement does not contain an implied condition that the parties' son, Stephen Law, shall participate in counseling as a condition precedent to [Husband's] obligation to pay for Stephen Law's educational expenses as set forth in paragraph 8 of the Marital Dissolution Agreement. The Court further ruled that ... pursuant to paragraph 8 of the April 4, 2004, Marital Dissolution Agreement, [Husband] was ordered to pay the cost of tuition, fees, books, room and board, and medical insurance as long as he can maintain coverage through his

employer, and other expenses mutually agreed upon between Stephen and [Husband] associated with a four-year college or vocational education for Stephen, commencing immediately upon Stephen's graduation from high school and ending four (4) academic years later. On August 30, 2005, [Wife] paid Stephen Law's tuition for the fall semester 2005 at Boston University in the amount of \$20,768. [Wife] is awarded a judgment in the amount of \$20,768 plus interest at the statutory rate of 10%. In addition, on February 7, 2006, [Wife] paid Boston University the sum of \$22,575 for the college tuition expenses for Stephen at Boston University for the spring semester 2006. [Wife] is awarded an additional judgment against [Husband] in the amount of \$22,575 plus interest at the statutory rate of 10% for a total judgment of \$43,343....

It is further ORDERED, ADJUDGED and DECREED that [Husband] shall make all future college tuition payments for Stephen Law within 48 hours of the receipt of the invoice from Boston University.

The Trial Court then ordered Husband to pay Wife over \$69,000 in attorney fees.

Husband appeals claiming: (1) the Trial Court erred when it refused to find Wife in contempt for her claimed refusal to force Stephen to attend counseling; (2) the Trial Court erred when it determined that Stephen's attending counseling was not a condition precedent to Husband having to pay for Stephen's college education; (3) the Trial Court erred when it determined that Husband "had no right to participate in the college decision-making process with [Stephen]"; (4) the Trial Court erred when it ordered Husband to pay for Stephen's college expenses contrary to this Court's holding in *Medearis v. Baumgardner, supra*; (5) the Trial Court erred when it ordered Husband to pay Wife's attorney fees; and (6) the Trial Court erred when it reversed its initial decision awarding Husband \$15,000 in attorney fees. Wife claims Husband's appeal is frivolous.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The first issue raised by Husband is whether the Trial Court erred when it concluded that, because neither the Trial Court nor Wife could force Stephen to attend counseling, it could not hold Wife in contempt of court when she failed to "ensure" that Stephen attend counseling. In his brief, Husband simply argues that Wife was in contempt for failing to ensure Stephen attended counseling and, therefore, the Trial Court must have erred when it refused to hold Wife in contempt.

Husband does not argue or cite us to any authority suggesting that either the Trial Court or Wife had the ability to force counseling upon an adult child of the parties to this domestic litigation. Stephen is not a party to this lawsuit. Even if Wife desperately wanted Stephen to attend counseling, the Trial Court simply could not have ordered that to happen. Neither could Wife. Accordingly, we affirm the Trial Court's order insofar as it concluded that Wife was not in contempt of court for failing to "ensure" that Stephen attended counseling once he turned 18.

The next issue is whether Wife could be held in civil contempt of court for allegedly failing to "ensure" Stephen attended counseling for the 6-month period prior to his turning 18. Husband relies on *Overnight Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005) in support of his claim that the Trial Court could award him damages for Wife's civil contempt even if Wife no longer was in contempt at the time of the hearing.² The Court in *Overnight* was construing Tenn. Code Ann. § 29-9-105 (2000) which provides:

Performance of forbidden act. - If the contempt consists in the performance of a forbidden act, the person may be imprisoned until the act is rectified by placing matters and person in status quo, *or by the payment of damages.* (emphasis added)

The *Overnight* Court was considering whether a Union could be held liable for engaging in strike activity that was forbidden by a court order when, at the time of the hearing, the contemptuous conduct had ceased. The Court also was called upon to decide whether a finding that a party was not in civil contempt could be appealed. The Supreme Court resolved these issues as follows:

The trial court recognized that compensatory damages are available in a civil contempt action but held that the cessation of strike activity prior to a hearing on the issue of contempt precluded a finding of civil contempt. The trial court therefore granted the defendants' motion for summary judgment and dismissed the civil contempt claims....

When the contempt consists of the performance of a forbidden act, the cessation of the contemptuous conduct after the entry of the order prohibiting that conduct does not preclude a finding of civil contempt and an award of damages. Neither the plain language of section 29-9-105 nor that of section 29-9-102(3) requires that the disobedience of a court's order be ongoing. *See City of Cookeville v. Humphrey*, 126 S.W.3d 897, 902 (Tenn. 2004) (noting that where the language of a statute is clear and unambiguous, we must apply the statute in accordance with its plain language). Although the strike had ended, any disobedience of the injunction by the defendants

² It is important to note that this case does not involve criminal contempt proceedings.

would not be “rectified” until the defendants paid damages to Overnite making it whole. *See* Tenn. Code Ann. § 29-9-105 (1980 & 2000)....

We hold that a right to appeal lies from a trial court’s refusal to hold an alleged contemnor in civil contempt. We further hold that an injured party may recover damages pursuant to Tennessee Code Annotated section 29-9-105 from the contemnor who performed the forbidden act, even though the contemptuous conduct is not ongoing....

Overnight, 172 S.W.3d at 511, 512.

The present case, unlike *Overnight*, does not involve civil contempt allegations asserting that a party engaged in acts forbidden by a court order. Rather, this case involves allegations that a party failed to engage in acts that were mandated by a court order. This is an important distinction because when a party allegedly is in contempt for failing to engage in required acts, the contempt is governed by Tenn. Code Ann. § 29-9-104, as opposed to § 29-9-105. Tenn. Code Ann. § 29-9-104 provides as follows:

Omission to perform act. - (a) If the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, the person may be imprisoned until such person performs it.

(b) The person or if same be a corporation, then such person or corporation can be separately fined, as authorized by law, for each day it is in contempt until it performs the act ordered by the court.

For whatever reason, the General Assembly chose not to provide for compensatory damages in cases of civil contempt brought pursuant to Tenn. Code Ann. § 29-9-104, i.e., cases involving a party’s omission to perform a required act. Husband filed the relevant petition for contempt well after Stephen turned 18. Therefore, to the extent that Wife was in civil contempt for not “ensuring” that Stephen attend counseling, that contemptuous conduct had long since ceased by the time the petition was filed. Furthermore, Wife could not be ordered to perform that particular omission because by the time of the hearing Stephen was over 18. Based on these undisputed facts, we conclude that the Trial Court did not commit any error when it dismissed the petition as it pertained to Wife’s allegedly contemptuous conduct which had ceased many months before the petition was filed.

Husband’s next argument that Wife was in civil contempt involves a temporary order filed by the Trial Court when this litigation began. Specifically, the Trial Court entered a temporary order which, among other things, prohibited either of the parties from moving out of State with the children. This “temporary” order was not made permanent and there was no mention whatsoever in either the final divorce decree or the MDA as to whether one of the parties could move from

Tennessee with Stephen. It is undisputed that Wife and Stephen moved to Virginia, although there is some dispute over when that move took place. The Trial Court determined that because no mention was made in the final decree or MDA of any party moving with Stephen out of Tennessee, that the temporary order was no longer in effect and had been supplanted by the final decree. We agree with the Trial Court and conclude that the temporary order was no longer in force once the final decree incorporating the MDA was entered. Since neither the final divorce decree nor the MDA make any reference to one of the parties moving out of Tennessee, and because Husband does not challenge Wife's move to Virginia pursuant to the Parental Relocation Statute, Tenn. Code Ann. § 36-6-108 (2005), we affirm the judgment of the Trial Court on this issue.

The next set of issues involve the real crux of this appeal, which is whether Husband was required to pay for Stephen's college education. Husband first claims that the Trial Court's ruling was erroneous because the MDA requires Stephen to attend counseling as a condition precedent to Husband having to pay for college. We disagree. The clear language of the MDA does not impose Stephen's attendance at counseling as a prerequisite to Husband's obligation to pay for college. While we understand Husband's desire for his son to obtain counseling, we are not at liberty to read into the MDA a provision that simply is not there. We affirm the Trial Court's ruling that the MDA does not require Stephen to attend counseling as a prerequisite to Husband's obligation to pay for college.

The MDA does, however, contain a provision that "[t]he selection of a school to be attended by Stephen shall be based on the mutual agreement of Stephen and [Husband] ... [and Husband's] approval shall not be unreasonably withheld." Husband argues that Stephen's attendance at Boston University was not by "mutual agreement." The record is unclear as to why Husband did not or would not agree to Stephen's attendance at Boston University when the MDA specifically provides that the "cost of attendance for Stephen shall not exceed the cost of attendance at Boston University" There obviously is some connection to that university. Even though Husband may have a difficult time proving there was no "mutual agreement" or that his agreement was reasonably withheld, we are unable to conclude, as a matter of law, that such proof cannot be established. Based on the record before us, it appears that the Trial Court never specifically ruled on Husband's claim that Stephen's attendance at Boston University was not by "mutual agreement." Accordingly, we remand this case to the Trial Court for a hearing on whether Stephen's attendance at Boston University was by mutual agreement between Stephen and Husband as required by the MDA, or if there was no mutual agreement, whether Husband reasonably withheld his agreement.

Husband's next issue is his claim that he should be relieved of "any further duty of support for Stephen Law's educational expenses under the MDA" pursuant to this Court's opinion in *Medearis v. Baumgardner*, No. E2005-01785-COA-R3-CV, 2006 WL 770464 (Tenn. Ct. App. Mar. 27, 2006), *no appl. perm. appeal filed*. Again, we note that the Trial Court never addressed this issue.

In *Medearis*, as in the present case, the father agreed in a marital dissolution agreement to pay for the college education of the parties' son. The facts in *Medearis* which are relevant to this appeal establish:

In 2000, the father filed a Petition for Contempt and to Modify the Final Decree. The Petition alleged that the mother had interfered with the father's visitation rights, and allowed Jimmy to disregard the visitation schedule. The father sought injunctive relief and mediation, asking the Court to order the mother to cooperate with the visitation schedule. The mother responded with a counter-claim for increased child support.

The Court conducted a hearing on June 26, 2000, including an interview with Jimmy in chambers, in the presence of the attorneys. In that interview, Jimmy opined he did not have a good relationship with his father, that he and his father did not communicate because the father would not listen, and that he would be ok with the Court telling the father to leave him alone. Further, that his father had "taken him to court" which made him angry, and basically expressed his desire to have nothing to do with his father.

* * *

The Court credited the father's testimony that the mother told him during the divorce that he would not have to pay support if he would agree not to see the child. The Court stated the father testified his relationship with Jimmy began to deteriorate soon thereafter, and Jimmy would not visit. The mother stated that she let Jimmy decide whether to visit. The Court found that the father went to a counselor, but the mother did not and the father sent gifts, cards, money and letters to Jimmy to try to keep the relationship alive, but Jimmy would then leave messages telling the father he wanted no contact. The Court found that the father had not seen Jimmy since their last hearing in 2000, and Jimmy blamed everything on the father and accepted no responsibility.

The Court found that with regard to child support that Jimmy wanted nothing to do with his father, but still wanted his money. The Court discussed the case law in Tennessee where a parent's influence over the child's relationship with the other parent was a factor in change of custody, and recognized the policy that a child's relationship with a non-custodial parent was very important. The Court found that it was clear that the mother had no use for the father and didn't want him around or involved, and wanted to be free of him. The Court found that Jimmy grew up in this environment and it affected how he felt about his father.

The Court then noted that in Tennessee, every contract had an implied standard of good faith and fair dealing, and that the MDA in

this case provided for visitation, and the 2000 Order provided that the parties would attend counseling, but the mother had failed to comply with both. The Court found that a person who materially violates a contract could not then claim breach by the other party. The Court held the mother had breached the implied duty of good faith and fair dealing, and had also violated her duty to foster the other parent's relationship with the child, and the father was thus relieved of any further duty of support under the MDA. The Court also held that the mother was guilty of unclean hands for failing to abide by the Court's orders.

Medearis, 2006 WL 770464, at *1, 2.

On appeal, this Court affirmed the judgment of the trial court. We agreed with the trial court's holding that a parent's obligation to pay post-majority support is a matter of contract and that all contracts "carry with them a duty of good faith and fair dealing." *Id.* at *3 (citing *Elliott v. Elliott*, 149 S.W.3d 77 (Tenn. Ct. App. 2004)). We then stated:

In ascertaining and giving effect to the parties' intentions regarding the MDA, it is clear that the Contract provided that the father would have liberal visitation with Jimmy, as set forth in the visitation schedule, and that there would be a continuing and viable father/son relationship, as the Trial Court found. The Trial Court, however, concluded that this relationship had deteriorated, and that both son and mother were responsible. The evidence does not preponderate against this factual determination. Tenn. R. App. P. 13(d). The evidence establishes the mother did not pressure the child to go to visit the father, but instead, let a minor make those decisions. In the ensuing years, the mother did not tell, ask, or encourage the child to visit or contact the father at all, and she did not attend the counseling mandated by the Court after the 2000 hearing, and did not, as custodial parent, ensure that Jimmy went to such counseling. The result was a complete breakdown in the father/son relationship, and the Court properly concluded the father had not received all the benefits that he was entitled to under the MDA, and further the mother had violated the implied duty of good faith and fair dealing because she had impaired the father's rights under the Contract.

* * *

The Court found the mother failed to comply with the Court's prior order regarding counseling and working together to repair the relationship, which further evidenced her lack of good faith and fair dealing, as well as subjecting her claim to the additional defense of unclean hands. This latter doctrine has been utilized to "deny relief

if the granting of the relief asked will, because of the complained of activities of the litigant, produce an illegal or unjust result.” *C.J.S. Equity*, § 111. In this case, the Court invoked the doctrine of unclean hands due to the mother’s conduct regarding the child’s relationship with the father, and her disregard of the Court’s prior order regarding counseling. The evidence does not preponderate against this finding. Tenn. R. App. P. 13(d). It would be unjust to allow the mother to gain her requested relief from the Court when she disregarded the Court’s prior order.

While Jimmy is not a party to this action nor to the contract, he did nothing to mend the relationship with his father, stating that he wanted nothing to do with him. His conduct as a third-party beneficiary of this Contract can be taken into account in determining whether the father’s obligation to continue to support him post-majority should be enforced. *See Lopez v. Taylor*, 2005 WL 3555700 (Tenn. Ct. App. Jan. 4, 2005)(“A beneficiary’s right against the promisor is subject to any claim or defense arising from his own conduct or agreement”). Further, as the Trial Court explained, other jurisdictions that recognize a legal duty of a parent to support an adult child in college have held that the parent is excused from that duty when the child has repudiated his or her relationship with that parent. *See McKay v. McKay*, 644 N.E.2d 164 (Ind. Ct. App. 1994); *Hambrick v. Prestwood*, 382 So.2d 474 (Miss. 1980); and *Milne v. Milne*, 383 Pa. Super, 177, 556 A.2d 854 (1989).

Medearis, 2006 WL 770464, at *3-4 (footnote omitted).

In the present case, Husband claims that since the divorce, Wife has set about on a calculated course to destroy any relationship between him and Stephen, and that she has been very successful. Even though Wife’s alleged conduct may not have been contemptuous given the peculiarities of this case, that does not mean that she has not engaged in conduct that would violate the MDA’s implicit duty of good faith and fair dealing. Accordingly, we vacate the judgment awarded to Wife for \$43,343 for Stephen’s college education. We remand this case for a hearing on whether Wife violated her duty of good faith and fair dealing such that Husband is relieved of his contractual obligation to pay for Stephen’s college education. In making this determination, the Trial Court is to consider Wife’s conduct post-divorce up to the date of the hearing and is not limited to the time frame before Stephen turned 18. In addition, the Trial Court must make a separate determination as to whether Stephen repudiated his relationship with Husband, thereby relieving Husband of his obligation to pay for Stephen’s college education.

The final issues involve attorney fees. We first will address whether the Trial Court erred when it reversed its initial award to Husband of \$15,000 in attorney fees. As stated previously, those fees were awarded to Husband after he successfully defended one of Wife’s petitions for contempt. After the Trial Court awarded the fees to Husband, Wife then filed a motion to reconsider

arguing that Husband's request for attorney fees, which was filed more than 30 days after entry of the order dismissing Wife's petition for contempt, was untimely and should not have been granted. The Trial Court agreed, concluding that the order dismissing Wife's petition for contempt became final after 30 days and the Trial Court, therefore, had no subject matter jurisdiction to consider Husband's attorney fee request.

As set forth previously, the Supreme Court in *Overnight Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005) held that "a right to appeal lies from a trial court's refusal to hold an alleged contemnor in civil contempt." *Id.* at 512. The Court in *Overnight* also stated:

The present case ... involves a civil contempt action that arose out of a civil proceeding. A civil contempt action is generally brought to enforce private rights. *See Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 377 S.W.2d 908, 912 (1964). The safeguards afforded to one accused of criminal contempt are not available to one accused of civil contempt. Tennessee Rule of Appellate Procedure 3(a) governs the right to appeal a trial court's order declining to hold an alleged contemnor in civil contempt in a civil case. Rule 3(a) provides that "[i]n civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right." Rule 3(a) does not exclude civil contempt proceedings from an appeal as of right, and we can discern no reason to impose such restriction.

Overnight, 172 S.W.3d at 510.

Thus, according to *Overnight*, the denial of an order refusing to find a party in civil contempt can be appealed in accordance with Tenn. R. App. P. 3(a), which requires entry of a "final judgment." In *Overnight*, when the trial court refused to hold the Union in civil contempt, it did so by granting the Union's motion for summary judgment. When the motion for summary judgment was granted, there were no outstanding issues and the litigation at the trial court level was effectively over. In short, there was a final judgment. In the present case, when the Trial Court entered its order refusing to find Husband in civil contempt, there were several matters still pending before the court. The order dismissing Wife's petition for contempt, therefore, was not a "final order" for purposes of Tenn. R. App. P. 3(a) and the Trial Court had subject matter jurisdiction to entertain Husband's request for attorney fees. The Trial Court's order concluding that it did not have jurisdiction to award Husband attorney fees is vacated, and the original award of \$15,000 to Husband is reinstated.

The final issues surround the propriety of the Trial Court's award to Wife of attorney fees in the amount of \$69,000. We are altogether unable to determine exactly how much of the total attorney fees awarded apply to any particular petition or motion. We vacate the attorney fee award to Wife to the extent that the fees were incurred during the battle over whether Husband must pay for Stephen's college education. Once the Trial Court resolves on remand the various issues regarding payment of Stephen's college education, the Trial Court at that point also must determine

whether either of the parties are entitled to payment of their attorney fees pursuant to the terms of the MDA or otherwise.

While the parties were filing the various petitions against each other, Wife filed a motion for Tenn. R. Civ. P. 11 sanctions against Husband, which was granted by the Trial Court without explanation. In the motion, Wife claimed she was entitled to sanctions based on various pleadings filed by Husband which Wife claimed violated Rule 11 because, among other things, they were frivolous. One of the claims Wife argues was frivolous was Husband's claim that he should be relieved of any obligation to pay for Stephen's college education. Given our previous rulings in this case, we must vacate the Trial Court's granting of Wife's motion for Rule 11 sanctions. On remand, the Trial Court is to reconsider the propriety of that motion in light of this Opinion and the proof introduced at the hearing on remand.

We previously affirmed the Trial Court's judgment declining to hold Wife in contempt for her alleged refusal to force Stephen to go to counseling. To the extent any of the attorney fees awarded to Wife were incurred in defense of that unsuccessful petition filed by Husband, the award of those fees is affirmed.³

Wife claims that Husband's appeal was frivolous and that she is entitled to an award of attorney fees incurred on this appeal. For obvious reasons, we decline to hold that Husband's appeal is frivolous. Given our resolution of the issues now before us, we hold that neither party is entitled to attorney fees incurred on this appeal.

Conclusion

The judgment of the Trial Court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this Opinion and for the collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Melvin Douglas Law, Jr., and his surety, and one-half against the Appellee, Brenda Carr Law.

D. MICHAEL SWINEY, JUDGE

³ There may have been other petitions that Wife was successful in prosecuting or defending which were not appealed by Husband or addressed in this Opinion. If Wife was awarded attorney fees for any other petition(s) in which she was the successful party, but which was not appealed or otherwise addressed by this Court, then the award of fees for those petition(s) is affirmed.